IN THE
SUPREME COURT OF MISSOURI

No. 93379

ANDRO TOLENTINO,
Plaintiff-Appellant,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., et al.,
Defendants-Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit,
Case No. 1016-CV12176
The Honorable W. Brent Powell, Judge

SUBSTITUTE BRIEF FOR RESPONDENTS

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STATEMENT OF FACTS

Plaintiff's Statement of Facts in his substitute brief is far more extensive than in his brief filed in the court of appeals, largely due to a new and lengthy description of Starwood's supposed involvement in the hiring, training and firing of plaintiff. (Plaintiff's Substitute Brief ("Plf's Br.") 9-13). These additional factual assertions are in large part not supported – and in many instances contradicted – by the record. Moreover, these new assertions are not relevant to the issues presented in this appeal. Starwood sets forth a more detailed Statement of Facts than would otherwise be necessary, noting where appropriate some of the assertions made in plaintiff's Statement of Facts that are either not supported by or are contrary to the record.

A. Starwood Contracted with Giant Labor Services and Other Vendors to Procure Additional Housekeeping Services.

Defendant Starwood Hotel and Resorts Worldwide, Inc. is the owner and operator of hotels and resorts under various brand names, including Westin, throughout the United States and abroad. Starwood Hotels & Resorts Worldwide, Inc. owns defendant Westin Hotel Management, L.P., which in turn operates the Westin Crown Center in Kansas City, Missouri (the "Westin") (Legal File ("LF") 0167 ¶1; LF0192 ¶3; LF1225 ¶1). Starwood employs a number of full-time individuals who perform housekeeping services, cleaning hotel rooms and preparing the rooms for the arrival of new guests. (LF0168 ¶4; LF0192 ¶5; LF1225 ¶4).

To efficiently operate the Westin, Starwood also contracts with vendors (the "Contractors") to perform a portion of the housekeeping services required to be done at

the Westin. Starwood contracts with these vendors to avoid hiring too many or too few of its own employees. The Contractors, in turn, hire and maintain their own workforce of housekeepers ("Contract Room Attendants") to assist them in completing the work. (LF0168 ¶5; LF0192 ¶6; LF1225 ¶5). Many other area hotels contract out some of their housekeeping services. (LF0168 ¶6; LF0244 ¶74; LF1226 ¶6). This arrangement is common in the hotel industry because of the frequent fluctuations in demand for hotel lodging. (LF0168 ¶7; LF0192 ¶6; LF1226 ¶7).

Giant Labor Services ("GLS") was one of the Contractors who performed housekeeping services at the Westin from 2005 until 2009. (LF0168 ¶8; LF0337 at 18:3-12, 20:23-25; LF1226 ¶8). GLS is not a parent, subsidiary, or affiliate of Starwood or Westin, or of any of Starwood or Westin's parents, subsidiaries or affiliates. (LF0168 ¶9; LF1227 ¶9). GLS has no ownership interest in Starwood or Westin or in any of Starwood or Westin's parents, subsidiaries, or affiliates; Starwood, Westin, and their respective parents, subsidiaries, and affiliates have no ownership interest in GLS. (LF0168 ¶10; LF1227 ¶10).

The "Services Agreement" dated October 21, 2005, entered into by Starwood and GLS (the "Agreement") set forth the terms under which GLS provided housekeeping services to Starwood. (LF0169 ¶14; LF0358-70; LF1229 ¶14). Pursuant to the Agreement, Starwood communicated to GLS how many Contract Room Attendants were needed to perform housekeeping services on a given day. GLS would then select Contract Room Attendants from its workforce – which it had hired and maintained on its own – to fulfill Starwood's needs. (LF0177 ¶64; LF0192 ¶7, LF1242 ¶64). The

Agreement provided that GLS would be responsible for payment of wages, taxes and benefits to GLS's employees. (LF0169 ¶5; LF0360 ¶2; LF1225 ¶5).

B. GLS Employed its Own Room Attendants, Separate From Starwood's Employee Housekeepers.

GLS was responsible for providing the Contract Room Attendants who assisted it in performing its obligations under the Agreement. (LF0172 ¶37; LF0358-70; LF1233 ¶37). GLS was free to provide housekeeping services to companies other than Starwood, and it did so in Kansas City and elsewhere in the United States. (LF0173 ¶39; LF0203 ¶10; LF0353 ¶9; LF1234-35 ¶39). For example, in addition to the Westin, GLS provided housekeeping services to Marriott Union Hill, Hilton Embassy Suites Hotel, Hotel Phillips, Hilton Doubletree Hotel, and Branson Creek Golf Club. (LF0173 ¶40; LF0244 ¶74; LF1235 ¶40). GLS also had contracts with other hotels and resorts in Alabama, Arizona, California, Colorado, Florida, Kansas, Louisiana, Massachusetts, Minnesota, Nevada, New Jersey, South Carolina and Wyoming. (LF0174 ¶41; LF0213 ¶1; LF1235 ¶41).

Starwood does not maintain, nor has it ever maintained, any documents or records relating to the discipline, performance, compensation, and/or benefits of GLS employees, including plaintiff, or any other documentation customarily maintained in an employee's personnel file. (LF0174 ¶46; LF0194 ¶16; LF1235-37 ¶40). Starwood has no personnel records for plaintiff or any other Contract Room Attendants. (LF0174 ¶48; LF0392; LF1237 ¶48). Starwood did keep handwritten sheets on which Contract Room Attendants would sign in and out and note the number of rooms cleaned, but these

records were kept merely to assist GLS and other contractors in accurately billing Starwood for the Contract Room Attendants' work. (LF0175 ¶49; LF0193 ¶13; LF1238 ¶49).

In contrast, Starwood maintains extensive personnel files on its own employees who perform housekeeping services, including applications for employment, information obtained through background checks, tax forms, numerous acknowledgments regarding the training the employee has received, and information regarding compensation and benefits. (LF0175 ¶53, LF0194 ¶17; LF1238-39 ¶53).

C. Starwood Did Not Hire, Train, Pay, Schedule, or Supervise Plaintiff.

Plaintiff worked for GLS as a Contract Room Attendant at the Westin from February 2008 until April 2008. (LF0176 ¶54; LF0405-406 at 70:12-25, 77:7-9). The last day on which he provided housekeeping services at the Westin was April 22, 2008. (LF0176 ¶55; LF1239 ¶55). The Westin was not the only location at which plaintiff worked during his employment with GLS. (LF0183 ¶98; LF0407 at 81:13-21; LF0408 at 84:7-85:18; LF1252 ¶98).

Starwood had no authority under the Agreement to make hiring decisions for GLS pertaining to plaintiff or any other GLS employee. (LF0177 ¶60; LF0360 ¶2; LF1241 ¶60). Starwood has not participated in the hiring decisions with respect to any of the GLS employees, including plaintiff. (LF0177 ¶62; LF0194 ¶18; LF1241 ¶62). Plaintiff submitted an application to GLS, not to the Westin, in connection with his assignment as a Contract Room Attendant. (LF0177 ¶63; LF0409 at 97:4-6; LF0410 at 119:16-21; LF1241-42 ¶63). Plaintiff's allegation in his "Facts" that the Westin "made the final

decision" to hire him is not supported by competent evidence in the record. (Pl's Br 10); (LF1007, ¶ 54, LF1239, ¶54).

Starwood did not compensate plaintiff or any of GLS's Contract Room Attendants. (LF0168 ¶66; LF0405 at 73:12-19; LF0413 at 137:12-14; LF0196 ¶27; LF1242-43 ¶66). Pursuant to the Agreement, Starwood would pay GLS, and GLS then could pay its own employees in whatever manner it chose, so long as that manner complied with applicable law. (LF0178 ¶68; LF0358-370; LF1243 ¶68). Starwood had no role in determining or modifying plaintiff's compensation. (LF0178 ¶72; LF0 196 ¶27; LF1243-44 ¶72). Despite his statement to the contrary in his new Statement of Facts, plaintiff testified he did not discuss his pay with Starwood. (LF405–06; LF1027 ¶¶ 132–33).

Plaintiff's Statement of Facts is further negated by his testimony that he did not receive training from the Westin, and that he already knew how to clean hotel rooms based on his previous experience at other hotels. (LF0179 ¶78; LF0411 at 122:5-123:10; LF1245 ¶78). In contrast, Starwood provides on-board training to its own employees. (LF0179 ¶75; LF0 194 ¶19; LF0392; LF0179 ¶76; LF1244 ¶75). Upon starting work, Starwood's employees attend numerous training seminars featuring in-person instruction. (LF0177-78 ¶65; LF0194-95 ¶19; LF1242 ¶65).

Pursuant to the Agreement, Starwood contacted GLS on a regular basis to advise it of the number of Contract Room Attendants that would be needed to perform housekeeping services. (LF0180 ¶80; LF1246 ¶80). GLS decided which Contract Room Attendants would perform housekeeping services at the Westin. (LF0180 ¶81; LF0194

¶18; LF1246-47 ¶81). If Starwood's need for Contract Room Attendants fluctuated from day to day, Starwood requested more or fewer Contract Room Attendants accordingly, but GLS decided which Contract Room Attendants would be sent to or pulled from the Westin. (LF0180 ¶82; LF0192 ¶8; LF1247 ¶82). Starwood did not have, nor did they express, any preference as to which Contract Room Attendants GLS assigned to perform services, so long as the Contract Room Attendants were able to satisfy the Westin's quality standards. (LF0180 ¶83; LF0194 ¶18; LF1247 ¶83). Starwood merely assigned the Contract Room Attendants to clean certain rooms once they arrived at the Westin. The same was true for plaintiff. Again contrary to his new factual assertions, Plaintiff testified that Starwood did not tell him how many hours he had to work, or how long he had to stay at the Westin, but simply assigned him rooms to clean. (LF0180 ¶84; LF0196 ¶26; LF1247-48 ¶¶84-85).

D. Starwood Did Not Evaluate or Fire Plaintiff.

Starwood did not have authority to, and did not, conduct performance reviews for plaintiff or any of the other Contract Room Attendants. (LF0181 ¶85; LF0340 at 59:16-22; LF1248-49 ¶85). Starwood did not counsel or discipline plaintiff or any other Contract Room Attendants employed by GLS, nor did it have authority to do so. (LF0181 ¶86; LF0343 at 86:15-17; LF1249 ¶86). Starwood merely performed quality-control inspections to assess the Contractors' performance of their obligations under the Agreements. (LF0181 ¶88; LF0195 ¶22; LF0341-42 at 78:1-20, 81:21-83:4; LF1249 ¶88). The quality control inspections are intended to ensure that the Contractors are performing timely and quality work as required by the Agreements. (LF0181 ¶90;

LF0195 ¶22; LF1250 ¶90). Starwood, however, did not supervise the day-to-day activities of the Contract Room Attendants. (LF0182 ¶91; LF0195 ¶22; LF1250 ¶91). GLS sent its own employees to perform quality-control inspections to ensure its own compliance under the Agreement. (LF0182 ¶93; LF0195 ¶23; LF1251 ¶93). If any Contract Room Attendants were not achieving Starwood's standards of cleanliness, Starwood would notify GLS rather than speak to the Contract Room Attendants individually. (LF0182 ¶94; LF0196 ¶24; LF0343 at 86:15-21; LF1251 ¶94).

In contrast, when dealing with their own housekeeping employees, Starwood conducts periodic performance reviews, counsels the employees regarding the quality of their work, and carries out progressive discipline as is necessary. (LF0181 ¶87; LF0195 ¶21; LF1249 ¶87).

Starwood had no authority to terminate plaintiff and never requested that GLS terminate the employment of a Contract Room Attendant. (LF0182 ¶95; LF0343 at 87:4-88:10; LF1252 ¶95). Plaintiff alleges "the Westin terminated his employment" (Plf's Br 12), but the record shows the Westin simply told GLS it no longer wanted him at the Westin, and GLS told him he was no longer to work at the Westin. (LF406–07). Although Starwood had the right to request that a Contract Room Attendant not perform work under the Agreement at the Westin, as it did with plaintiff, GLS was free to employ such individuals in any other capacity at other locations. (LF0182 ¶96; LF0343 at 87:4-88:10; LF1252 ¶96). Even after plaintiff stopped providing services at the Westin, he continued to work for GLS, and thereafter GLS assigned plaintiff to perform work at the Marriott Union Hill. (LF0183 ¶98; LF0407 at 81:13-21; LF1252 ¶98).

E. GLS Withheld Plaintiff's Final Wages By Illegally and Unforeseeably Charging Plaintiff Visa Fees Unbeknownst to and Unauthorized by Starwood.

Almost all of the housekeeping services performed by plaintiff for GLS at the Westin were performed more than two years prior to the date that plaintiff filed his Petition, April 21, 2010, and consequently are outside the statute of limitations period for the MMWL. (LF0183 ¶99; LF0406 at 77:7-9; LF1253 ¶99). Plaintiff's last pay stub from GLS shows compensation for his work performed at the Westin during the period "April 13, 2008 to April 26, 2008" – the only pay period that included work performed by plaintiff within the statute of limitations period. (LF0183 ¶100; LF0426; LF1253 ¶100). It is undisputed that plaintiff's wages were properly set by GLS above the applicable minimum wage and for any applicable overtime pay during the relevant time frame that he worked at the Westin. The paycheck stub reflects that GLS deducted from those wages appropriate federal income tax, Medicare, and Missouri income tax withholdings. (LF0426).

Unbeknownst to Starwood, and obviously without its authority, GLS then deducted H-2B visa fees from plaintiff's final paycheck for work performed at the Westin. (LF0184 ¶112; LF0426; LF1256 ¶112). This resulted, effectively, in GLS taking back from plaintiff the wages it had given to him. Plaintiff admits that Starwood had no knowledge of this fact, and he has never even alleged that Starwood should have known of the illegal visa scheme. (LF1022, ¶ 112).

F. The Investigation, Indictment, and Conviction of GLS.

On or about January 29, 2008, federal law enforcement officials, including officials from the U.S. Department of Labor, U.S. Department of Homeland Security, and the Internal Revenue Service, contacted Starwood to discuss the GLS Agreement. (See LF0184 ¶113; LF0455; LF0338 at 42:11–43:3; LF1256 ¶113). This was the first time Starwood learned that GLS was under investigation for potentially engaging in criminal activity. (LF0185 ¶114; LF0196 ¶29; LF1256 ¶114). During that meeting, Starwood's representatives asked whether they should immediately terminate their business dealings with GLS. Law enforcement instructed Starwood to continue using GLS as a Contractor during the course of the criminal investigation so as not to alert GLS to the criminal investigation. (LF0185 ¶115; LF0338 at 43:4-23; LF0197 ¶30; LF1256 ¶115).

Starwood fully cooperated with and assisted law enforcement during the criminal investigation and prosecution. (LF0185 ¶117; LF0197 ¶31; LF1256 ¶117). Federal law enforcement subpoenaed documents and testimony from Starwood on numerous occasions, including in February 2008, September 2008, June 2009 and October 2010. (LF0185 ¶116; LF0456-62; LF1256 ¶116). During this period when Starwood was cooperating with the federal government in its investigation of GLS, plaintiff was placed at the Westin by GLS to perform housekeeping services. Plaintiff's final pay period, which gives rise to this action, occurred during the period of time during which Starwood was using GLS's services solely at the specific request of the government, so as not to jeopardize its pending investigation of GLS's criminal activities.

On May 6, 2009, GLS and its principals were indicted for several crimes, including racketeering, human trafficking, fraud in foreign labor contracting, money laundering, extortion, mail fraud, and visa fraud. (LF0185 ¶118; LF0463-552; LF1256 ¶118). The indictment was later superseded on January 7, 2010. (LF0185 ¶119; LF0208-333; LF1256 ¶119). Starwood was not accused of any wrongdoing, nor was it identified as part of the criminal conspiracy. (LF0185 ¶120; LF0463-552 ¶¶3, 41; LF1256 ¶120).

Federal law enforcement concluded that Starwood had been "defrauded" by GLS and its principals. (LF0185 ¶121; LF0555; LF1256-57 ¶121). U.S. Immigration and Customs Enforcement ("ICE") similarly concluded that GLS promised Starwood and other hotel owners that it would "comply with all pertinent labor and immigration laws, to pay all relative employment taxes, and to carry proper insurance coverage on GLS workers," but failed to keep that promise. (LF0186 ¶122; LF0602; LF0425 at 256:19-257:24; LF1256-57 ¶121).

After the indictment, Starwood cooperated with the Department of Homeland Security to remit GLS contract sums directly to the GLS Contract Room Attendants (who could be located) who had performed services at the Westin during the last few weeks of the GLS Agreement. (LF0186 ¶123; LF0347 at 114:22-115:16; LF1256 ¶122). Starwood retained no money owed to GLS under the GLS Agreement. (LF0186 ¶124; LF0193 ¶12; LF0604-608; LF1256 ¶123). Starwood also hired a few former GLS employees after the criminal action commenced. (LF0186 ¶125; LF0345 at 99:9-100:6; LF1256 ¶125). Even though these former Contract Room Attendants had already performed housekeeping services at the Westin, Starwood nevertheless required them to

go through Starwood's formal hiring process. (LF0186 ¶126; LF0197 ¶33; LF1256 ¶126).

Plaintiff erroneously states that the record does not support the court of appeals' finding that there was an actual criminal *conviction*. There is no question GLS's principals were convicted, and this is supported by the record. (LF0619—0629). As part of the criminal proceeding, plaintiff and other GLS employees have been awarded restitution. (LF0187 ¶128; LF0609-618; LF0619-29; LF1256 ¶127). Plaintiff was awarded restitution in the amount of $3,150, which the criminal judgment identifies as plaintiff's "total loss." (LF0187 ¶129; LF0617; LF0627; LF1256 ¶128).

G. The Proceedings Below.

On April 21, 2010, plaintiff sued Starwood on behalf of himself and a class of purportedly "similarly-situated" individuals. Plaintiff did not sue GLS. Plaintiff asserted claims for violations of the MMWL, breach of contract, unjust enrichment, and quantum meruit based on allegations that GLS did not pay plaintiff minimum wage and overtime in accordance with the MMWL and that Starwood retained benefits of his labor without paying for them. On July 5, 2011, plaintiff moved to certify a class of all Contract Room Attendants who worked at the Westin based on a theory that Starwood's contractual arrangement of paying Contactors based on the number of rooms the Contractor's employees cleaned – as opposed to hours worked – and assuming rooms could generally be cleaned in 30 minutes or less, "resulted in plaintiff and other similarly-situated Housekeepers not being paid for all time worked." (LF0045-72; LF0680-711). Plaintiff purported to bring this class action on behalf of all Contract Room Attendants performing

services at the Westin, including those employed by Contractors other than GLS, despite the lack of any evidence that any visa fees were illegally withheld from those Attendants.

On August 4, 2011, Starwood filed its opposition to class certification and also moved for summary judgment on all of plaintiff's claims. The trial court decided to rule on the motion for summary judgment before addressing the motion for class certification. In its summary judgment motion, Starwood demonstrated that the pay-per-room arrangement did not result in any failure to meet minimum wage and overtime requirements under the MMWL. Starwood also asserted it was not a joint employer with GLS, and even if it were, there should be no joint employer liability for the unforeseen criminal scheme of GLS which resulted in GLS withholding wages from plaintiff for an H-2B visa. In addition, Starwood moved for judgment as a matter of law on the rest of plaintiff's claims.

On March 8, 2012, the trial court entered summary judgment in favor of Starwood on all of plaintiff's claims, thus mooting plaintiff's motion for class certification. The trial court determined that, even assuming Starwood and GLS were joint employers, Starwood could not be held liable for the unforeseeable criminal acts of its joint employer, GLS, who intentionally withheld Plaintiff's wages.

On July 5, 2012, plaintiff appealed the trial court's order as to the dismissal of his MMWL claim only. On appeal, plaintiff did not dispute the fact that he was properly compensated under the law by the "pay per room" arrangement, but he argued essentially that Starwood should be required to reimburse him for the H-2B visa fees withheld from his paycheck as part of GLS's unforeseeable criminal scheme. The court of appeals

affirmed the trial court's decision on April 2, 2013. On April 17, 2013, plaintiff filed a motion for rehearing/application for transfer with the court of appeals which was denied on April 30, 2013. On May 5, 2013, plaintiff filed an application for transfer which this Court granted on August 13, 2013.

POINT RELIED ON

I. THIS COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT TO STARWOOD ON PLAINTIFF'S CLAIM UNDER THE MMWL BECAUSE, EVEN ASSUMING THAT STARWOOD AND GLS WERE JOINT EMPLOYERS, STARWOOD IS NOT LIABLE TO PLAINTIFF FOR HIS UNPAID WAGES IN THAT GLS WITHHELD PLAINTIFF'S FINAL PAYCHECK AS PART OF AN UNFORESEEABLE CRIMINAL SCHEME.

In re Estate of Parker, 25 S.W.3d 611 (Mo. App. 2000)

Ramos-Barrientos v. Bland, 661 F.3d 587 (11th Cir. 2011)

Pecan Shoppe of Springfield, Mo., Inc. v. Tri-State Motor Transit Co., 573 S.W.2d 431 (Mo. App. 1978)

Reyes v. Remington Hybrid Seed Co., 495 F.3d 403 (7th Cir. 2007)

STANDARD OF REVIEW

"This Court's review of a grant of summary judgment is essentially *de novo*; therefore, the trial court's order may be affirmed in this Court on an entirely different basis than that posited at trial, and this Court will affirm the grant of summary judgment under any appropriate theory." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. 2010) (citations omitted).

In his Standard of Review, plaintiff cites to cases for the proposition that summary judgment should seldom be granted under the joint employer doctrine because of the prevalence of factual issues. (Plf's Br 19). Those cases are inapplicable to this case since the trial court presumed that Starwood and GLS were joint employers for purposes of summary judgment, but still held that Starwood was not liable to plaintiff for GLS's unforeseeable criminal acts.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT TO STARWOOD ON PLAINTIFF'S CLAIM UNDER THE MMWL BECAUSE, EVEN ASSUMING THAT STARWOOD AND GLS WERE JOINT EMPLOYERS, STARWOOD IS NOT LIABLE TO PLAINTIFF FOR HIS UNPAID WAGES IN THAT GLS WITHHELD PLAINTIFF'S FINAL PAYCHECK AS PART OF AN UNFORESEEABLE CRIMINAL SCHEME.

Introduction

The trial court properly ruled that Starwood could not be liable for unpaid wages as a joint employer under the MMWL when it was the unforeseeable criminal acts of the other joint employer which caused plaintiff not to receive his wages. The trial court determined GLS's illegal deduction for the visa fees was the only reason plaintiff did not receive the compensation he earned. Since there is no statute, regulation, or case law addressing this unusual situation, the trial court properly looked to the purpose of the MMWL and the joint employer doctrine, common law regarding strict liability, and common law principles of agency.

Plaintiff is essentially asking Starwood to reimburse him for H-2B visa fees withheld from his wages by his employer, GLS, as part of the criminal scheme for which its principals were convicted. Plaintiff concedes that GLS's withholding of his wages was unforeseeable, and that its criminal scheme defrauded not only plaintiff, but Starwood as well. Plaintiff urges, however, that summary judgment in favor of Starwood be reversed because if Starwood and GLS are joint employers, then Starwood should be

liable for GLS's withholding his wages, even though it constituted admittedly unforeseeable, criminal activity.

Although plaintiff argues the trial court's decision "will leave a large segment of workers employed through employee staffing agencies without any remedy to recover the wages they duly earned," he cannot support that statement with any citations or facts. Plaintiff has cited no case, and Starwood has not located any, in which a court has imposed joint employer liability under the MMWL or Fair Labor Standards Act ("FLSA") on one employer for unforeseeable criminal acts committed by another. This is not surprising. Even if the MMWL and its regulations are read expansively so as to impose a sort of "strict liability" on one joint employer for the acts of the other employer, a joint employer should not be liable for another's unforeseeable criminal acts. To hold otherwise would be unprecedented; contrary to the common law regarding strict liability; inconsistent with the rule that an employer is not liable for unauthorized acts by its agent that cause an employee's wage to fall below minimum wage; and contrary to the purpose of the MMWL.

A. The Trial Court Properly Followed Common Law in Interpreting the MMWL.

Relying on well-accepted common-law principles, the trial court properly interpreted the MMWL when it determined that joint-employer status does not render one joint employer liable for another joint employer's unforeseeable criminal acts (citing *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co. L.P.*, 75 S.W.3d 247 (Mo. 2002) and *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55 (Mo. Banc 1974)). Plaintiff argues that

the trial court erred because nothing in the text of the MMWL suggests Missouri's "common law should override the governing statutes and regulations in the interpretation of the MMWL." (Plf's Br 24). But neither the trial court, nor Starwood, have stated that the common law should "override" anything in the MMWL. In the highly unusual situation presented by this case--a situation which is not addressed by the statute or regulations—the trial court appropriately looked to the common law for guidance on how the statute should be interpreted. This is proper under both Missouri and federal law.

There are numerous Missouri cases recognizing this principle of statutory interpretation: *In re Estate of Parker*, 25 S.W.3d 611 (Mo. App. 2000), recognizing the "the general principle that unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." *Id.* at 614; *State ex rel. Brown v. III Investments, Inc.*, 80 S.W.3d 855 (Mo. App. 2002), again recognizing that "[u]nless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." *Id.* at 860; *Perry v. Strawbridge*, 108 S.W. 641 (Mo. 1908): "Statutes should be read in the light of the common law . . . for it must not be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason … we cannot be surprised at the great sanction given to this rule of construction." *Id.* at 645 (citation omitted).

It is likewise well established under federal law that statutes should be interpreted in accordance with common law principles. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991): "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." (internal quotations and citations omitted). *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952): "Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." See also *Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278, 2289 n.13 (2010) (Citing approvingly to both *Astoria* and *Isbrandtsen* for the same principles).

Indeed it was necessary for the trial court to turn to common law to determine the proper scope of liability here, as the statute and the regulations do not address the unique factual scenario presented by this case. It is important here to note just what, if anything, the MMWL states about joint employer liability. The MMWL statute does not actually use the term "joint employer" but defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Mo. Rev. Stat. § 290.500(4). "Employee" is in turn defined as "any individual employed by an employer." Mo. Rev. Stat. § 290.500(3). There are no Missouri regulations defining the term "joint employer," nor the scope of joint-employer liability. The Missouri court of appeals recently acknowledged the lack of cases interpreting these definitions, and so it

turned to federal law for guidance, noting Missouri's express directive to interpret and enforce the MMWL in accordance with the Fair Labor Standards Act (the "FLSA"). *See Fields v. Advanced Healthcare Mgmt. Servs., LLC*, No. SD30756, 2011 WL 1587367, at *5 (Mo. App. Apr. 27, 2011) (citing 8 C.S.R. 30-4.010(1) (2004)).

As plaintiff recognizes, Missouri appellate courts have interpreted and enforced the MMWL in light of the regulations implementing the FLSA, found in 29 C.F.R. Chapter V. 29 C.F.R. § 791.2 ("Joint employment") recognizes that an employer will not be liable for violations of the FLSA by another employer unless the two employers have employees in common and certain other relationships exist between the two employers:

> Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by

> reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 CFR § 791.2(b).

Plaintiff contends that the relationship between Starwood and GLS fits within the second category, urging that GLS was acting "in the interest of" Starwood even though GLS's criminal acts defrauded both him and Starwood. (Plf's Br. 14). Neither the MMWL, the FLSA, nor the applicable regulations identify further what it means to act "in the interest of" the other employer. Plaintiff is asking this Court, without legal support in the statute or regulations, to expand joint employer liability in the wage and hour context to include vicarious liability for another's unforeseeable criminal acts. Since neither the MMWL nor the FLSA statutes or regulations address this situation, in determining the proper scope of joint-employer liability, it was appropriate for the trial court to look to the well-accepted common-law principle that one generally cannot be liable for the unforeseeable criminal acts of another.

B. Common Law Tort Principles Support Affirming Summary Judgment.

Even if Section 791.2 were read expansively so as to generally to impose "strict liability" upon a joint employer for another employer's violations of the MMWL, well established common law principles provide guidance here. Under strict liability law, a joint employer should not be liable for another employer's unforeseeable criminal acts which result in that other employer withholding wages from an employee. *Cf. Pecan Shoppe of Springfield, Mo., Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431 (Mo. App. 1978) (even if defendant is strictly liable for damages, defendant will not be held

liable for damages caused by unforeseeable criminal acts); *Sutherland v. Elpower Corp.*, 923 F.2d 1285 (8th Cir. 1991) (although manufacturer is strictly liability under statute for failure to warn about dangerous uses of manufacturer's product, manufacturer is not liable where product was used in unforeseeable manner causing injury).

In *Pecan Shoppe*, a tractor trailer carrying dynamite exploded when a striking employee of the owner shot at the tractor trailer, killing the driver and causing severe damage to plaintiff's store. Plaintiff sued the owner, who was in the business of transporting dynamite, and alleged that the owner was strictly liable for damage caused by the explosion. Plaintiff relied on the rule that "[w]hen persons or property, located in populated areas and off the premises of the storer of dangerous substances, are injured as a result of an explosion of the substances, the storer incurs liability regardless of the question of the degree of care he exerted to prevent an explosion." *Id.* at 434-35 (citations omitted). Plaintiff urged that because "1. Tri-State [the owner] was operating its truck, loaded with dynamite, on the highway; 2. The dynamite exploded; [and] 3. As a direct result of the explosion, plaintiff sustained damage for which it was not fully compensated," the owner was liable to plaintiff. *Id.* at 433.

The owner argued that even if it were strictly liable for explosions of dynamite carried in its tractor trailers, it should not be liable for the unforeseeable criminal acts of its employee. The court agreed, citing analogous cases holding that although a defendant may be strictly liable, the defendant "should not be treated as an insurer" for the unforeseeable criminal acts of others. The court further stated that even if the owner were strictly liable:

> In order for this court to uphold plaintiff's contention . . . this court would have to take the additional step . . . of invoking the doctrine of absolute liability where the undisputed evidence shows that the explosion was caused by the criminal act of a third person. This it is unwilling to do.

Id. at 438-39.

Like the plaintiff in *Pecan Shoppe*, plaintiff argues that 1. because Starwood is presumed to be a joint employer with GLS; and 2. because Section 791.2 states that joint employers are "are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [MMWL]," then 3. Starwood is liable for GLS's withholding otherwise appropriately set wages from plaintiff as part of its criminal scheme. Like *Pecan Shoppe*, even if this Court were to find that Starwood is "strictly liable" for any MMWL violation by GLS, the Court should not hold Starwood liable for the unforeseeable criminal acts of GLS which resulted in GLS basically stealing plaintiff's wages from him.

Plaintiff takes issue with the trial court's reliance in part on what he considers "inapposite case law in which common law tort actions had been brought against a defendant." (Plf's Br 30, 31). But, even the case law cite by plaintiff as support for his one Point Relied On, *Virginia D. v. Madesco Investment Corp.*, 648 S.W.2d 881 (Mo. 1983), is a tort case which in fact further validates the trial court decision. (Plf's Br 15). As this Court later noted, *Virginia D.* indicates that whether a property owner is under a duty to protect its invitees depends on whether the third party's criminal act was

foreseeable. *Madden v. C&K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. 1988) ("The touchstone for the creation of a duty is foreseeability."). *Virginia D.* and its progeny confirm that Starwood should not be liable for the criminal acts of its presumed joint employer when those acts were, as plaintiff concedes, not foreseeable.

C. Cases Interpreting the FLSA Likewise Demonstrate that Joint-Employer Liability Does Not Extend to the Unforeseeable Acts of Another Joint Employer.

As in strict liability in tort law, cases interpreting what it means to be "acting in the interests of the other employer" under the FLSA clearly incorporate the common law element of foreseeability. The case plaintiff relies upon heavily, *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403 (7th Cir. 2007), actually supports affirmance of summary judgment in favor of Starwood because it recognizes an element of "foreseeability" in joint employer liability. In *Reyes*, a recruiter recruited workers to detassel corn plants in fields under the control of Remington. *Id.* at 404. Remington paid the recruiter and the recruiter was then responsible for paying the workers. *Id.* at 405. Presumably without Remington's knowledge, the recruiter failed to pay the workers a portion of their pay and later became insolvent. *Id.* The workers sued Remington and the recruiter under the FLSA and Agricultural Workers Protection Act ("AWPA") seeking to impose joint employer liability upon Remington. The court concluded that because Remington hired a single person to supply a labor force; because the recruiter had put together a crew for Remington alone; because the recruiter had no business organization that he could shift from one place to another; and because Remington supplied the tools – facts that

distinguish *Reyes* from this case – Remington and the recruiter were joint employers and Remington was liable to the workers for missing wages. *Id.* The court justified its ruling by noting that Remington's losses were *preventable and foreseeable*, stating: "[o]nly when it hires a fly-by-night operator, such as Zarate . . . is Remington exposed to the risk of liability on top of the amount it has agreed to pay the contractor." *Id.* at 409.

In its court of appeals' briefing plaintiff declared: "if *Reyes* teaches anything, it is that **the insolvency** of a second joint employer should always be **considered foreseeable** as a matter of law and that such insolvency cannot serve as an excuse for not paying the wages of an employee." (Plf's Ct App Br 20–21 (emphasis added)). In this Court, however, plaintiff has revised this phrase to state that "[i]f *Reyes* teaches us anything, it is the failure of a second joint employer to pass on wages to an employee is foreseeable as a matter of law." (Plf's Br 33). *Reyes* does not support plaintiff's newly revised statement of its lesson. The actual principle of foreseeability from *Reyes* supports affirmance of summary judgment in favor of Starwood. In contrast to the Reyes' workers' losses resulting from the insolvency of the "fly by night" recruiter, plaintiff's losses were due to what plaintiff concedes are unusual and unforeseeable criminal acts by GLS. In contrast to Remington, Starwood could not foresee or avoid the losses inflicted by GLS in withholding wages for an H-2B visa as part of a criminal scheme for which its principals were convicted.

Yet another case plaintiff cites—*Barfield v. NY City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008)—recognizes the element of foreseeability necessary for joint employment liability in the wage and hour context. In *Barfield*, the court carefully

examined the facts to determine that the defendant hospital should have known the plaintiff nurse had been working more than 40 hours a week at the hospital even though she was placed there by three different staffing agencies. Therefore, this case in fact supports the requirement of foreseeability or knowledge before one joint employer will be held liable for the other's non-payment of wages.

By the time GLS placed plaintiff at the Westin, Starwood had been working with GLS for approximately three years, and there is no evidence in the record that Starwood had any notice GLS was withholding wages for visa fees - although plaintiff obviously knew. While the courts in *Reyes* and *Barfield* justified holding the parties liable under a joint employer theory because the harm was foreseeable and avoidable, no such justification exists here to hold Starwood jointly liable for GLS's unforeseeable criminal acts.

D. Plaintiff Failed to Preserve His Current Claim that GLS's Criminal Activity Was "Foreseeable As a Matter of Law."

The trial court granted summary judgment because it concluded Starwood could not be liable as a joint employer for GLS withholding plaintiff's wages as part of an "unforeseeable" criminal scheme. (LF 1277–79). Plaintiff did not argue in the trial court or the court of appeals that the criminal scheme was, or should have been, foreseeable. In fact, he admitted in the trial court that Starwood had no knowledge of the GLS's criminal activity which resulted in GLS withholding plaintiff's properly set wages. (LF1022, ¶ 112). Similarly, plaintiff sought transfer of this matter to this Court "for resolution of the following question of general interest and importance: Whether a judicially-created

exception to the Missouri Minimum Wage Law's ("MMWL") joint employer doctrine should be recognized in cases where one joint employer's failure to pay minimum wages and overtime compensation constitutes **unforeseeable criminal activity**." (Tr. Request 1, emphasis added).

Now recognizing foreseeability as an important element in determining liability, plaintiff claims throughout his brief to this Court that GLS's criminal activity was foreseeable as matter of law. (Plf's Br 17, 21, 26, 32-35). This Court should not consider this newly-crafted argument. See Rule 83.08(b); *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009) (argument in substitute brief that "appeared nowhere in the brief to the court of appeals . . . will not be considered by this Court").

Even if this Court were to consider this new argument, however, plaintiff cites no law which supports his claim that the criminal scheme was or should have been foreseeable to Starwood. Plaintiff cites several cases for the proposition that: "The joint employer doctrine holds joint employers responsible for each other's unlawful conduct (e.g., not paying employees), and therefore actions which result in employees' non-compensation are foreseeable as a matter of law." (Plf's Br 35 n. 16). None of the cases cited say anything remotely of the sort, and certainly none discuss whether one joint employer can be held liable for the criminal, unforeseeable conduct of another joint employer:

- In *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) the court simply decided that under the FLSA an operator of a meat boning plant was

an "employer" of a group of meat boners who worked at the plant under independent contracts. The opinion contains no details of the alleged violations of the FLSA, and no indication of what or whose conduct allegedly left the employees under-compensated.

- In *Barfield v. NY City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008) the plaintiff nurse was repeatedly placed at the same defendant hospital by three different employee staffing agencies. In certain weeks, the nurse worked more than 40 hours at the hospital, but through multiple different referral agencies such that she was not working more than 40 hours for any one of the referral agencies. The court found that the hospital was the nurse's joint employer. Significantly, in ruling that the hospital would be liable as a joint employer, the court found it important that the hospital knew or should have known that the nurse was working more than 40 hours a week at the hospital. Id. at 148.
- In *Bastian v. Apartment Investment and Mgmt. Co.*, No. 07C2069, 2008 WL 4671763 (N.D. Ill. Oct. 21, 2008) the court only addresses the general joint-employer question. Like *Rutherford*, the opinion contains no detail about the alleged violations of the FLSA, no indication of how the employees were under-compensated or by whom, and no discussion of the scope or extent of one joint employer's liability for the other joint employer's conduct.

- In *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003) the defendant pharmacy group operated several pharmacies that outsourced its need for delivery drivers to various contractors. The plaintiff delivery drivers sued the pharmacy group for FLSA violations, claiming that the pharmacy group was their joint employer. The court agreed with the drivers, but again, there was no discussion of the alleged violations of the FLSA, no indication of how the drivers were under-compensated or by whom, and no discussion of the scope or extent of one joint employer's liability for the other joint employer's conduct.
- In *Flores v. Albertson's, Inc.*, No. CV01-0515, 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003) the defendant supermarket outsourced its janitorial services to various contractors. The plaintiff janitors brought FLSA claims against the supermarket, and the supermarket moved for summary judgment on the ground that it was not the joint employer of the janitors. The court ultimately denied the defendant's motion on the ground that there were still disputes about material facts pertinent to the joint-employer question. Much like *Rutherford* and *Bastian*, this case only deals with the joint-employer question. The opinion contains no detail about the alleged violations of the FLSA, no indication of how the employees were under-compensated or by whom, and no discussion of the scope or extent of one joint employer's liability for the other joint employer's conduct.

E. Cases Holding That an Employer Is Not Liable for Unauthorized Acts of Its Agents that Reduced an Employee's Wages Below the Minimum Wage Support the Trial Court's Grant of Summary Judgment.

In cases closest to the factual scenario at issue here, other courts have held that an employer itself (not simply a presumed joint employer, like Starwood here) is not liable for the unauthorized acts of its agent that cause an employee's compensation to fall below minimum wage. *Ramos-Barrientos v. Bland*, 661 F.3d 587 (11th Cir. 2011); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002). Both cases involve situations in which an employee's wages fell below minimum wage because of unauthorized visa or other immigration fees and expenses charged to the employees. Both stand for the proposition that an employer will not be deemed liable for the unauthorized and unknown actions of its agent or any intervening third party that cause the compensation of the employer's workers to fall below legal minimum wage and overtime requirements.

In *Ramos*, defendant Bland, a company that owned and managed a farm, contracted with International Labor, a temporary staffing company, to procure temporary workers from Mexico through the Department of Labor's H-2A visa program. *Id.* at 590-91. Unbeknownst to Bland, International Labor collected passport, visa and consular fees from the workers which resulted in the workers' pay dropping below minimum wage. *Id.* at 593. The workers sued, alleging that Bland breached the minimum wage provisions of the FLSA by failing to reimburse the workers for those fees. *Id.* at 590. The court found in favor of Bland, reasoning:

> Bland never expressly permitted the collection of fees nor acquiesced in the collection of fees. The agreement that Bland signed [with International Labor] made no reference to the collection of fees from workers. Lott and Yearous [employees of Bland] both testified that Wicker [International Labor's Vice President] made assurances that workers would not have to pay any "under-the-table" charges and that the flat fee to International Labor covered all expenses.

Ramos-Barrientos, 661 F.3d at 600–01.

In *Arriaga*, an employer (the "Growers") contracted with a temporary staffing company to procure workers through the H–2A visa program. The staffing company hired an individual in Monterrey, Mexico, to assist with the recruitment of workers. The individual then communicated with "contact persons" to assist with recruitment efforts in other areas of Mexico. 305 F.3d at 1233–34. The contact persons charged referral fees to workers hired to work for the Growers, and an assistant of the individual in Monterrey also charged an administrative fee to some of the workers, resulting in the workers' pay dropping below minimum wage, again similar to GLS's charge for an H-2B visa fee. *Id.* The workers sued, alleging violations of the FLSA's overtime provisions. *Id.* at 1231. The court again ruled in favor of the employer because the workers had presented no evidence of any "words or conduct of the [employer] which, reasonably interpreted, could have caused the [workers] to believe the [employer] consented to have the recruitment fees demanded on their behalf." *Arriaga*, 305 F.3d at 1245.

Arriaga and *Ramos-Barrientos* both stand for the proposition that an employer will not be liable for the unauthorized and unknown actions of its agent or any intervening third party that cause the compensation of the employer's workers to fall below legal minimum wage and overtime requirements. *Arriaga* and *Ramos-Barrientos* are persuasive authority for concluding that Starwood should have no joint employer liability here because even though Bland and the Growers were the *actual employers* of the workers at issue, they had no FLSA liability when their agent improperly withheld fees and reduced the employees' wages below minimum wage.

These decisions are further support for interpreting Section 791.2 as not extending a joint employer's liability to include the unforeseeable and criminal violations of another employer which result in the wrongful withholding of wages. Such an interpretation "harmonizes" the provisions of the MMWL with Section 791.2. *Brandsville Fire Protection Dist. v. Phillips*, 374 S.W.3d 373, 378 (Mo. App. 2012). Such an interpretation also does not lead to oppressive and absurd results, as does plaintiff's. *Daly v. State Tax Comm'n*, 120 S.W.3d 262, 267 (Mo. App. 2003). Such an interpretation is also consistent with the legal principles governing strict liability.

F. Imposing Joint Employer Liability on Starwood for the Unforeseeable Criminal Acts of GLS Would Be Contrary to the Purpose of The MMWL.

Statutes and regulations should be construed "to effectuate the intention of the legislature and to comport with reason. . . ." *Brandsville*, 374 S.W.3d at 378. "Further, we will not construe a statute or regulation to produce unreasonable, oppressive, or

absurd results." *Daly*, 120 S.W.3d at 267. "When determining legislative intent, the court should consider the history of the statute and the problem it sought to address." *Ross v. Whelan Sec. Co.*, 195 S.W.3d 559, 565 (Mo. App. 2006) (citation omitted).

The purpose of the FLSA, whose regulations the MMWL incorporates, is to benefit workers *and* to protect reputable employers who comply with its terms:

> The Act serves a public and private purpose. Its enforcement provisions are intended to protect workers and their families . . . but it is also intended to protect the employers who comply with [the] terms [of the Act]. . . .

Lerwill v. Inflight Servs., Inc., 379 F. Supp. 690, 696 (N.D. Cal. 1974).

The purpose of the joint employer doctrine under the FLSA and incorporated into the MMWL, is to prevent would-be "wage chiselers" from avoiding the overtime provisions of the act by having employees work overtime hours for a nominally separate employer. Richard J. Burch, A Practitioner's Guide to Joint Employer Liability Under the FLSA, 2 Houston Bus. & Tax J. 393, 404 (2002); Department of Labor, Interpretive Bulletin No. 13 (1940). *See also* Linder, The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion, 13 Workers' Comp. L. Rev. 453, 462 (1990) (purpose of Section 791.2 was "to guard against the possibility that joint employers would collude to undermine the aggregation of hours worked").

Other courts have recognized the policy statement cited by the court of appeals that the FLSA is not meant to be used as a "sword to impale unsuspecting employers": *Willis v. City of Florence*, No. Civ.A88-AR-5033-NW, 1988 WL 188461, at *4 (N.D.

Ala. Dec. 12, 1988) (The FLSA "is designed and intended as a shield to protect the unwary and not as a sword on which to impale an unsuspecting employer." (citations omitted)); *White v. Beckman Dairy Co.*, 352 F. Supp. 1266, 1271 (W.D. Ark. 1973) (The FLSA "is designed and intended as a shield to protect the unwary and not as a sword on which to impale an unsuspecting employer who is engaged in a business and honestly exercises a reasonable effort in good faith to comply with all the required provisions of such act." (citation omitted)).

Starwood is not a "wage-chiseler." Plaintiff concedes that his wages were set at an appropriate amount to meet Missouri minimum wage and overtime law, that Starwood paid GLS an appropriate amount, and that Starwood was unforeseeably defrauded by GLS. There is nothing illegal, or even unusual, about a hotel's use of a temporary agency to provide additional housekeepers when needed. In contrast to the situation in *Reyes*, GLS was not the only supplier of Contract Room Attendants for the Westin and GLS supplied temporary workers to many other hotels around the country. Starwood had been working with GLS, without notice of any wrongdoing, for several years before the short period at issue here. The only reason plaintiff did not receive an appropriate paycheck was because GLS charged him H-2B visa fees as part of its criminal scheme. GLS effectively stole plaintiff's wages from him. Since this theft was unforeseeable to Starwood, holding it liable here would be impaling an unsuspecting employer. Imposing joint employer liability on Starwood in this situation would not deter would-be "wage chiselers" and would be contrary to the purpose of the MMWL.

G. Plaintiff's Newly Raised Legal Arguments Were Not Properly Preserved and Do Not Support Reversing the Trial Court's Grant of Summary Judgment.

Plaintiff's brief to this Court improperly relies on several arguments that he did not raise in the court of appeals, which this Court therefore should not consider. See Rule 83.08(b); *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009) (argument in substitute brief that "appeared nowhere in the brief to the court of appeals . . . will not be considered by this Court").

Plaintiff argues, for instance, that the court of appeals "overlooked" that the FLSA provides civil and criminal penalties for the same act, and argues that this somehow renders GLS's criminal acts foreseeable. (Plf's Br 1,9). But even if plaintiff had properly preserved this argument by raising it in the trial court and the court of appeals, he cites no case in which a court has imposed joint-employer liability or criminal penalties under the MMWL or FLSA for the unforeseeable criminal acts of another which caused an employee not to receive appropriate wages. This is not surprising. Even if the FLSA or MMWL are read expansively so as to impose a sort of general "strict liability" on a joint employer for the acts of another employer, that liability should not extend to the other employer's unforeseeable criminal acts. To hold otherwise would (a) be contrary to the law regarding strict liability; (b) inconsistent with the rule that an employer is not liable for unauthorized acts by its agent that cause an employee's wage to fall below minimum wage; and (c) contrary to the purpose of the wage and hour laws.

Plaintiff also for the first time improperly references a specific Family and Medical Leave Act ("FMLA") regulation regarding employee staffing agencies. 29 C.F.R. § 8125.106(b)(1). (Plf's Br 23, n. 5). Even if the Court were to consider this regulation, the fact that it is not included in the FLSA regulations demonstrates that it has no bearing on the issues before this Court.

Yet another new, and equally ineffective, argument is plaintiff's claim that Starwood was plaintiff's "primary employer" and thus responsible for his wages "regardless of [Starwood's] contractual arrangement to have GLS pay his wages." Plaintiff cites to Judge Easterbrook's concurring opinion in *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1544–45 (7th Cir. 1987), in which he stated that the FLSA prevents an employee from contracting to less than the prevailing minimum wage. That opinion, however, does not address the "primary employer" theory advanced by plaintiff. This argument and the cited case have no bearing on a joint employer's liability for the unforeseeable criminal act of another employer that prevents the employee from receiving his wages.

Similarly, plaintiff's newly-placed reliance on workers' compensation law (Plf's Br 36-38) was not preserved in the trial court or on appeal. In any event, plaintiff overlooks that the workers' compensation statute defines "employer" differently in different contexts and has its own unique liability system. See Mo. Rev. Stat. § 287.040. Unlike the MMWL and the FLSA, the workers' compensation statute explicitly defines "employer" based on "work done under contract on or about his premises," provides a

system of liability for both primary and secondary employees, and provides an exception if the employee was insured by his "immediate or any intermediate employer." *Id.*

Finally, plaintiff's new arguments that the trial court's rulings are impractical have not been preserved for appeal and are not persuasive on the issues before this Court. Plaintiff suggests that affirming the summary judgment would lead to absurd results, arguing that an employer could always allege unforeseeable criminal activity when a joint employer has been indicted, and the trial court would have to decide whether to wait until the joint employer was convicted in another court or decide the criminal question itself. (Plf's Br 26-27). Even if this argument had been preserved, the Court would not need to address it because it is undisputed that the principals of GLS had been convicted before the trial court entered summary judgment.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH

MISSOURI SUPREME COURT RULE 84.06(b) and (c)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2010, by which it was prepared, contains 9,153 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I submitted electronic versions of this Substitute Brief of Respondent to the Clerk of the Supreme Court of Missouri for filing by using the Court's electronic filing system. I understand that doing so will accomplish service on all the following attorneys of record.

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